IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

JAMES E. BLOUNT, III,

Plaintiff-Appellant,

Vs.

Shelby Chancery No. 105653-3
C.A. No. 02a01-9605-CH-00101

JOHN M. JEFFERSON,
HOFFMAN-BURKE REALTORS, INC.,
JOSEPH DONAL PEARSON,
WILLIAM EDWARD PEARSON,

Defendants-Appellees.

FROM THE SHELBY COUNTY CHANCERY COURT
THE HONORABLE D. J. ALISSANDRATOS, CHANCELLOR

Robert A. Chamoun of Memphis
For Appellant

Thomas L. McAllister; Harris, Shelton, Dunlap and
Cobb of Memphis for Appellees, the Pearsons

Robert A. Cox; Glassman, Jeter, Edwards & Wade of Memphis
For Appellees, Jefferson and Hoffman-Burke

AFFIRMED

Opinion filed:

W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.

CONCUR:

DAVID R. FARMER, JUDGE

HOLLY KIRBY LILLARD, JUDGE

Plaintiff, James E. Blount, III, appeals from the order of the trial court granting summary judgment to the defendants, Joseph Donald Pearson, William Edward Pearson, John M. Jefferson, and Hoffman-Burke Realtors, Inc. On May 3, 1995, Blount filed a complaint against the above-named defendants styled "Complaint to Reform Deed of Trust and Note and for Compensatory and/or Punitive Damages."

The complaint alleges that on February 7, 1995, Blount entered into a land sales contract with Joseph Donald Pearson and William Edward Pearson for the purchase of commercial real estate located at 3984 Lamar Avenue in Memphis. The Pearsons were the sellers and were represented by John M. Jefferson, a real estate agent employed by Hoffman-Burke. The property was described as "[l]ocated at the Northeast corner of Clearpool Circle and Lamar Avenue consisting of 2 acres, more or less, a single family residence of approximately 2300 square feet and two out buildings (barn like structures)." The purchase price is stated as $125,000.00 payable partly in cash and partly by promissory note secured by a deed of trust on the property.

Blount avers that after closing the transaction he realized the property was not as large as he had anticipated. He alleges that Jefferson told him the property was in excess of 2.5 acres. He avers that Hoffman-Burke's sign on the property described the property as 215 feet across the front and 485 feet deep and that Hoffman-Burke's advertisement in a Memphis real estate magazine described the property as an "outstanding 2 acre site corner lot 212 ft. frontage on Lamar 483 ft. deep." The complaint avers that Blount had the property surveyed by a civil engineer, Dickinson and Bennett, Inc., who found that the commercial lot was actually 1.8465 acres.

Blount alleges that the defendants "wrongfully, knowingly, negligently, and/or fraudulently misrepresented the size of the commercial lot" and that he relied upon the misrepresentations to his detriment. He also alleges a violation of the Tennessee Consumer Protection Act, T.C.A. § 47-18-101 *et seq.* (1995). The complaint seeks reformation of the deed of trust and the note together with compensatory and punitive damages.

When the complaint was filed, Blount also served interrogatories on the defendants. The interrogatories were answered under oath by defendants Joseph Donald Pearson and William Edward Pearson and filed July 11, 1995. Interrogatory Number 4 and the answer thereto states:

INTERROGATORY NO. 4. State whether the size of the

> property at issue in this case was ever represented to James E. Blount, III to be a parcel two and one half acres in size by any of the defendants or Defendants' agents. State whether it was ever represented to anyone else to be two and one half acres in size, for each such instance identify the persons involved.
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> RESPONSE TO INTERROGATORY NO. 4.: No.

On June 6, 1995, the Pearsons filed a Motion to Dismiss the Plaintiff's Complaint or in the Alternative for Summary Judgment, and on October 9, 1995, Jefferson and Hoffman-Burke joined the Motion. On October 23, 1995, the trial court entered an order granting the defendants' motion for summary judgment. Blount perfected this appeal and presents three issues for our review.

Blount's complaint is premised primarily on alleged misrepresentations by the defendants that the lot he purchased contained 2.5 acres when in fact the lot contained only 1.8465 acres. Although the complaint avers representation in the advertisements as to the dimensions of the lot, the complaint does not specify any shortage in the dimension. We first note that the defendants' answers under oath to the interrogatories specifically deny that any representations were made by any of the defendants that the lot in question contained 2.5 acres. The record reveals no countervailing affidavit or deposition in opposition to the motion. Blount's brief asserts that "appellants and appellees filed memorandums [sic] to support their respective positions." Memoranda of counsel are mere argument in support of their respective positions and do not constitute supporting evidence. In the face of the sworn proof from the defendants that no representation was made that the lot contained 2.5 acres, Blount cannot rest on the allegations of his pleadings, but is required to respond with an affidavit or other specific facts showing a genuine issue for trial. ***Dellinger v. Pierce***, 848 S.W.2d 654, 656 (Tenn. App. 1992). There simply is no sworn testimony in this record that Blount acquired anything less than the real estate described in the contract of sale attached as an exhibit to the complaint.

However, the trial court filed a rather extensive order granting the motion for summary judgment. The trial court considered three issues, all of which were decided adversely to Blount. Blount's issues on appeal are essentially that the trial court erred in its decision on each of the three issues. The issues considered by the trial court are:

> 1) Whether there was a misrepresentation by the defendants where the actual acreage was .16 acres less than the acreage expressed in the contract;

> 2) Whether the parol evidence rule precludes evidence that the amount of acreage was represented to be 2.5 acres; and
>
> 3) Whether the plaintiff is entitled to maintain this suit under the Tennessee Consumer Protection Act (TCPA).

We will first consider the second issue. Obviously, to invoke the parol evidence rule there must be some attempt to introduce parol evidence. On summary judgment, cases are heard on affidavits and depositions. Since the record reflects that there was no affidavit or deposition from Blount concerning the alleged representations made to him by the defendants and no motion to strike the affidavit or deposition filed by the defendants, we will assume that the parties stipulated that such an affidavit and the subsequent motion to strike would be forthcoming to present the issue before the Court. In the interest of judicial economy, we will consider the issue in that manner. The trial court found that the size of the property was clearly covered in the contract in the language "2 acres, more or less." Therefore, the trial court held that the parol evidence rule precluded Blount from introducing evidence that representations were made to him that the property consisted of 2.5 acres. Blount apparently claims that the defendants orally represented to him on more than one occasion that the property in question was in excess of 2.5 acres, and that, based upon these misrepresentations, he believed the property was between 2 and 2.5 acres. On the other hand, the defendants claim that the size of the property was expressly addressed in the contract.

After preliminary negotiations and oral conversations are concluded and a contract is reduced to writing that is clear and unambiguous, there is a conclusive presumption that the parties have reduced their entire agreement to writing and that any parol agreement is merged in the written contract. ***Faithful v. Gardner***, 799 S.W.2d 232, 235 (Tenn. App. 1990). Testimony of prior or contemporaneous conversations for the purpose of altering, contradicting, or varying the terms of the written instrument is incompetent and inadmissible. ***Id.***

Blount asserts that he was induced to make the contract by the defendants' misrepresentations. We believe that the trial court properly applied the parol evidence rule. Alleged fraudulent representations that expressly negate or contradict the written instrument are inadmissible. ***Whelchel Co. v. Ripley Tractor Co.***, 900 S.W.2d 691, 693 (Tenn. App. 1995). In ***Whelchel***, this Court addressed the application of the parol evidence rule in cases of fraud:

> Granting the necessity and justice of allowing defenses based

> upon misrepresentations which do not contradict or change the plain terms of a written instrument, the allowance of defenses based on oral statements clearly inconsistent with the written instrument sued upon would appear to be a radical departure from long established and accepted rules of law and would defeat the very purpose of committing agreements to writing.
> Without doubting the veracity of the defendant-appellee, it must be recognized that one of the reasons for the parol evidence rule is to prevent fraud in presenting oral defenses to written instruments. That is, the parol evidence rule assumes that the parties deliberately chose to put their agreements in writing to avoid the uncertainties of oral evidence, including the possibility of false testimony as to oral conversations. Thus, the parol evidence rule is a "quasi-statute of frauds" which rejects evidence of any oral statement in contradiction of the terms of a written agreement.

Id. at 693-94 (quoting ***Farmers & Merchants Bank v. Petty***, 664 S.W.2d 77, 81-82 (Tenn. App. 1983)). The Court concluded that the alleged oral agreement directly contradicted a term of the contract and, therefore, should have been excluded. ***Id.*** at 694.

In this case, we believe that the language of the land sales contract plainly expresses the size of the property in question. The trial court correctly ruled that Blount would not be allowed to present evidence to contradict a term clearly expressed in the agreement.

In considering the first issue, the trial court, apparently relying on a stipulation as to the actual size of the lot, held as a matter of law that "the deficiency of .16 acres in this case was not sufficient to 'shock the conscience of the Court' and does not constitute a misrepresentation." The trial court relied upon ***Faithful v. Gardner***, 799 S.W.2d at 232. In that case, the Court concluded that the sale of land was in gross[1] and stated the following rule:

> [T]he rule is that, where it clearly appears that the sale was made in gross, and not by the acre, and the purchaser not only had every opportunity afforded him to ascertain and satisfy himself definitely as to the extent and location and quantity and boundaries of the lands purchased, but actually did so, going personally upon the property and viewing it from every angle, he had no right to recover for a deficiency, unless actual fraud is proven, or the circumstances and the deficiency are such as to raise a presumption of fraud. . . . In other words, relief will be granted where a deficiency is so great as to shock the conscience of the court because a presumption of fraud must thereupon arise.

Id. at 236 (quoting ***Smith v. Grizzard***, 259 S.W. 537, 538 (Tenn. 1924)).

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[1] A contract of sale by the tract or in gross is one wherein boundaries are specified, but quantity is not specified, or if specified, the existence of the exact quantity specified is not material; each party takes the risk of the actual quantity varying to some extent from what he expects it to be. ***Faithful,*** 799 S.W.2d at 234-35.

We agree with the trial court that the discrepancy between the represented size and the actual size is not shocking, and the property acquired conforms to the contract description, "2 acres, more or less."

We pretermit the remaining issue. The order of the trial court granting summary judgment is affirmed. Costs of this appeal are assessed against the appellant.

W. FRANK CRAWFORD,
PRESIDING JUDGE, W.S.

CONCUR:

DAVID R. FARMER, JUDGE

HOLLY KIRBY LILLARD, JUDGE